COURT OF APPEAL OF ALBERTA

REGISTRAR
FILED
JUL 03 2018
Court of Appeal of Alberta

COURT OF APPEAL FILE NUMBER:	1703-0237AC
TRIAL COURT FILE NUMBER:	1703-12327
REGISTRY OFFICE:	EDMONTON
PLAINTIFF/APPLICANT:	Her Majesty the Queen in Right of Canada
STATUS OF APPEAL:	APPELLANT
DEFENDANT/RESPONDENT:	Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., and 1919209 Alberta Ltd.
STATUS ON APPEAL:	RESPONDENT
DEFENDANT/RESPONDENT:	Ernst & Young Inc. (in its capacity as Monitor, and not in its personal capacity)
STATUS ON APPEAL:	RESPONDENT
DEFENDANT/RESPONDENT:	Business Development Bank of Canada
STATUS ON APPEAL:	RESPONDENT
DOCUMENT:	**BOOK OF AUTHORITIES**

Appeal from the Decision of
The Honourable Madam Justice J.E. Topolniski
Dated the 11th day of September, 2017
Filed the 5th day of October, 2017

BOOK OF AUTHORITIES OF THE RESPONDENT, ERNST & YOUNG INC. IN ITS CAPACITY AS COURT-APPOINTED MONITOR WITH EXPANDED POWERS, AND NOT IN ITS PERSONAL CAPACITY OF EACH OF CANADA NORTH GROUP INC. (NOW 667402 ALBERTA LTD.), CANADA NORTH CAMPS INC. (NOW 18512398 ALBERTA LTD.), 816956 ALBERTA LTD., 1371047 ALBERTA LTD. AND 1919209 ALBERTA LTD.

COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	1703-0237AC
TRIAL COURT FILE NUMBER:	1703-12327
REGISTRY OFFICE:	EDMONTON
PLAINTIFF/APPLICANT:	Her Majesty the Queen in Right of Canada
STATUS OF APPEAL:	APPELLANT
DEFENDANT/RESPONDENT:	Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., and 1919209 Alberta Ltd.
STATUS ON APPEAL:	RESPONDENT
DEFENDANT/RESPONDENT:	Ernst & Young Inc. (in its capacity as Monitor, and not in its personal capacity)
STATUS ON APPEAL:	RESPONDENT
DEFENDANT/RESPONDENT:	Business Development Bank of Canada
STATUS ON APPEAL:	RESPONDENT
DOCUMENT:	**BOOK OF AUTHORITIES**

Appeal from the Decision of
The Honourable Madam Justice J.E. Topolniski
Dated the 11th day of September, 2017
Filed the 5th day of October, 2017

BOOK OF AUTHORITIES OF THE RESPONDENT, ERNST & YOUNG INC. IN ITS CAPACITY AS COURT-APPOINTED MONITOR WITH EXPANDED POWERS, AND NOT IN ITS PERSONAL CAPACITY OF EACH OF CANADA NORTH GROUP INC. (NOW 667402 ALBERTA LTD.), CANADA NORTH CAMPS INC. (NOW 18512398 ALBERTA LTD.), 816956 ALBERTA LTD., 1371047 ALBERTA LTD. AND 1919209 ALBERTA LTD.

For the Respondents:

Ernst & Young Inc.

Darren R. Bieganek, QC
Duncan Craig LLP
2800 Scotia Place, 10060 Jasper Avenue
Edmonton, Alberta, T5J 3V9
Telephone: 780.441.4386
Facsimile: 780.969.6381

Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., and 1919209 Alberta Ltd. by Ernst & Young Inc. in its capacity as Monitor

Darren R. Bieganek, QC
Duncan Craig LLP
2800 Scotia Place, 10060 Jasper Avenue
Edmonton, Alberta, T5J 3V9
Telephone: 780.441.4386
Facsimile: 780.969.6381

Business Development Bank of Canada

Jeffrey Oliver & Mary I.A. Buttery
Cassels Brock & Blackwell LLP
Suite 3810, Bankers Hall West
888 – 3rd Street SW
Calgary, Alberta, T2P 5C5
Telephone: 403.351.2921
Facsimile: 403.648.1151

For the Appellant:

Her Majesty the Queen In Right of Canada

George F. Body
Department of Justice Canada
300, 10423 – 101 Street
Edmonton, Alberta, T5H 0E7
Telephone: 780.495.7595
Facsimile: 780.495.3319

For the Intervenors:

Canadian Association of Insolvency and Restructuring Professionals

Randal Van de Mosselaer
Osler, Hoskin & Harcourt LLP
Suite 2500, 450 – 1st Street SW
Calgary, Alberta, T2P 5H1
Telephone: 403.260.7060
Facsimile: 403.260.7024

Insolvency Institute of Canada

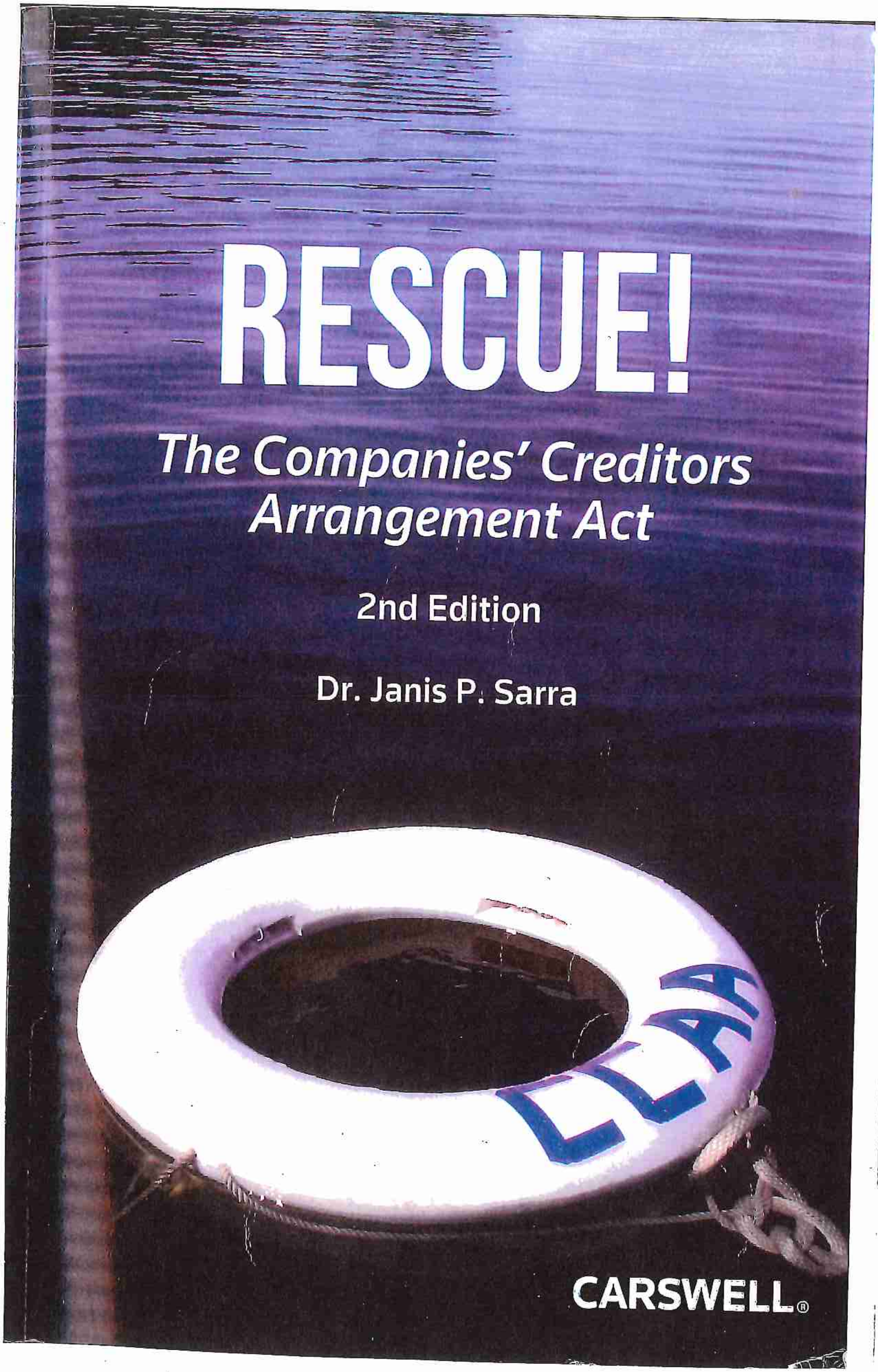
Kelly Bourassa
Blake, Cassels & Graydon LLP
855 – 2nd Street SW, Suite 3500
Calgary, Alberta T2P 4J8
Telephone: 403.260.9600
Facsimile: 403.260.9700

TABLE OF AUTHORITIES

LEGISLATION	
	Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 **[Tab C, Appellant's Book of Authorities, Volume 1]**
JURISPRUDENCE	
A.	*Rescue! The Companies' Creditors Arrangement Act (2nd Edition)*, 2013
	Canada North Group Inc. (Companies' Creditors Arrangement Act), 2017 ABQB 550 (the "Canada North Decision") **[Tab E, BDC's Book of Authorities, Volume 1]**
	Century Services Inc. v. Canada (Attorney General), 2010 SCC 60 **[Appellant's Book of Authorities, Volume 1, pg. 128]**
	Royal Bank of Canada v. Sparrow Electric Corp. (1997) 1 SCR 411**[Tab N, Appellant's Book of Authorities, Volume 2]**
B.	*Re: Stelco Inc.*, 2005 Carswell Ont. 1537
C.	*PricewaterhouseCoopers Inc. v Canada (Superintendent of Bankruptcy)*, 2008 ABCA 412

TAB A

***Rescue! The Companies' Creditors Arrangement Act (2nd Edition)*, 2013**


RESCUE!
The Companies' Creditors Arrangement Act
2nd Edition
Dr. Janis P. Sarra
CARSWELL®

Senior lenders often prefer higher recovery rehabilitation to liquidation, but where they are looking for a more immediate return of capital, they may press for liquidation.[11] Canada's regime shifted towards a rehabilitation model almost a decade earlier than nations such as the United Kingdom or Germany, which are now showing signs of moving from liquidation to reorganization as a key focus of the insolvency system. This global context is important because, as will be seen throughout this book, there is pressure for the system to change once again, given the control shifts internationally, in terms of the nature and type of lenders that increasingly dominate international capital and financial markets. The most recent changes raise new public policy challenges for an effective restructuring system.

Insolvency law is an indispensable component of commercial economies and regulates governance of the insolvent corporation during the key period of decision-making regarding its future. Insolvency law also plays a broad social and economic role in overall economic planning; the survival of financially distressed firms and the economic activity that they generate are in themselves important objectives of the system.[12] However, rehabilitation of the firm can only occur where a business is viable, and there may be some industries in which current capacity must be rationalized. Globalization pressures can make these determinations complex because the decision is often layered with whether there is a national interest in preserving particular types of economic activity within Canada or whether the assets should be put to their highest use elsewhere.

There can also be public policy issues associated with allowing one corporation to shed its debt and restructure, creating somewhat of a competitive advantage over corporations in the same market that were competitive until the debtor went through restructuring, down-sized or took other measures, free of the costs normally imposed on such activities by contractual and regulatory obligations. Workouts that provide an advantage to one party to the detriment of more vulnerable parties can create a downward spiral of economic activity in a particular sector. Arguably, the goal of the insolvency system is to maximize the value of the enterprise overall, and where firms can generate more value for stakeholders on a going-concern basis, the insolvency system should facilitate the debtor corporation's negotiation with creditors for a viable plan of arrangement.[13] Equally, however, one needs to be cognizant of the overall impact on a particular sector where one major corporation has restructured when the entire sector is in a struggle to survive.

[11] See discussion of financing in chapter 4.

[12] Karen Gross, *Failure and Forgiveness: Rebalancing the Bankruptcy System* (New Haven: Yale University Press, 1997).

[13] Janis Sarra, *Creditor Rights and the Public Interest, Restructuring Insolvent Corporations* (Toronto: University of Toronto Press, 2003).

TAB B

Re: Stelco Inc., 2005 Carswell Ont. 1537

2005 CarswellOnt 1537
Ontario Court of Appeal

Stelco Inc., Re

2005 CarswellOnt 1537, [2005] I.L.R. I-4430, [2005] O.J. No. 1575, 138 A.C.W.S. (3d) 949, 197 O.A.C. 1, 21 C.C.L.I. (4th) 1, 253 D.L.R. (4th) 524, 7 P.P.S.A.C. (3d) 281, 9 C.B.R. (5th) 307

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Weiler, Moldaver, MacFarland JJ.A.

Heard: March 24, 2005
Judgment: April 26, 2005
Docket: CA C42388

Proceedings: reversing *Stelco Inc., Re* (2004), 49 C.B.R. (4th) 283, 12 C.C.L.I. (4th) 26, 6 P.P.S.A.C. (3d) 268, 2004 CarswellOnt 1882 (Ont. S.C.J. [Commercial List])

Counsel: Robin B. Cumine, Q.C., Gustavo F. Camelino for Appellant, CAFO Inc.
Geoff R. Hall, Tom D. McKinlay for Respondent, Stelco Inc.

Subject: Corporate and Commercial; Insolvency; Insurance

Headnote

Personal property security --- Scope of legislation — Insurance and annuities

C Inc. was insurance premium financier — Insured was in proceedings under Companies' Creditors Arrangement Act ("CCAA") — C Inc.'s motion to lift stay under CCAA to allow it to terminate insurance policy which insured had in place with insurance carrier and thereby have unearned premiums paid to C Inc. by carrier pursuant to s. 138 of Insurance Act was dismissed — C Inc. took position that because of s. 4(1)(c) of Personal Property Security Act ("PPSA"), it was not required to register security interest it claimed in unearned premiums — Trial judge found s. 4(1)(c) of PPSA, which provides that PPSA does not apply "to a transfer of an interest or claim in or under any policy of insurance", was not clearly intended to encompass return of unearned premiums — Trial judge found even if C Inc. did not have to register under PPSA, it would not be appropriate to lift stay under initial CCAA order to permit C Inc. to cancel insurance — C Inc. appealed — Appeal allowed — Wording of s. 4(1) of PPSA encompasses return of unearned premiums — Not requiring that C Inc. register its interest conformed with other jurisdictions in order to create certainty and uniformity.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

C Inc. was insurance premium financier — Insured was in proceedings under Companies' Creditors Arrangement Act ("CCAA") — C Inc.'s motion to lift stay under CCAA to allow it to terminate insurance policy which insured had in place with insurance carrier and thereby have unearned premiums paid to C Inc. by carrier pursuant to s. 138 of Insurance Act was dismissed — C Inc. took position that because of s. 4(1)(c) of Personal Property Security Act ("PPSA"), it was not required to register security interest it claimed in unearned premiums — Trial judge found s. 4(1)(c) of PPSA, which provides that PPSA does not apply "to a transfer of an interest or claim in or under any policy of insurance", was not clearly intended to encompass return of unearned premiums — Trial judge found even if C Inc. did not have to register under PPSA, it would not be appropriate to lift stay under initial CCAA order to permit C Inc. to cancel insurance — C Inc. appealed — Appeal allowed — Wording of s. 4(1) of PPSA encompasses return of unearned premiums — Not requiring that C Inc. register its interest conformed with other jurisdictions in order to create certainty and uniformity.

APPEAL by insurer from judgment reported at *Stelco Inc., Re* (2004), 49 C.B.R. (4th) 283, 12 C.C.L.I. (4th) 26, 6 P.P.S.A.C. (3d) 268, 2004 CarswellOnt 1882 (Ont. S.C.J. [Commercial List]), dismissing insurer's motion to lift stay under *Companies Creditors' Arrangment Act* to permit cancellation of insurance policy.

Weiler J.A.:

1 This appeal raises two issues. First, when an insured has fully paid for a policy of insurance and assigns its right to receive a refund of any unearned premiums, is this a *security interest* that is *transferred*? Second, is it necessary to file notice of the security interest under the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("PPSA") or is the security interest exempt from registration by virtue of a combination of s. 4(1)(c) of the PPSA and s. 138 of the *Insurance Act*, R.S.O. 1990, c. I.8, or at common law?

Facts

2 CAFO Inc. ("CAFO") finances insurance premiums for businesses under a standard form Premium Instalment Contract (a "PIC"). A purchaser will give an insurance company a down payment on the premiums due to the insurer. Under the PIC, the purchaser agrees to pay the rest of the premiums to CAFO over time and CAFO pays the insurer that remaining sum up front in exchange for an assignment of the right to receive payment of any amounts due from the insurer, such as unearned premiums. This assignment functions as security for the total amount that CAFO pays to the insurer.

3 Stelco Inc. ("Stelco") and CAFO signed two PICs. The first concerned insurance for which the total premiums including taxes was $8.8 million. Stelco made all payments under this PIC. Stelco and CAFO also signed a PIC on June 11, 2003, under which funds were advanced for an insurance policy with Royal Sun Alliance Insurance. The premiums and taxes totalled $1.8 million; the down payment was $0.36 million and the balance plus service charge totalled $1.5 million. Stelco defaulted on this PIC in March 2004.

4 Before the default, on January 29, 2004, Farley J. made an order under the *Companies' Creditors Arrangement Act* ("CCAA") staying all actions by Stelco's creditors. Notice of the PIC was not registered under the PPSA because it was believed, based on the practice in the industry, that under s. 138 of the *Insurance Act* and s. 4(1)(c) of the PPSA, notice was not required to perfect the security. CAFO brought a motion asking Farley J. to permit it to enforce its security under the PIC. However, Farley J. refused, holding that the effect of s. 138 and s. 4(1)(c) did not create a perfected security interest in unearned insurance premiums unless notice of the PIC was filed under the PPSA. In holding that s. 4(1)(c) does not apply to exempt premium financing contracts, the motion judge essentially affirmed the opinion he had previously expressed in obiter in *Ivaco Inc., Re* (2003), 1 C.B.R. (5th) 204 (Ont. S.C.J. [Commercial List]). Farley J. also suggested that a security interest might not arise under the PIC until the underlying insurance policy is cancelled, calling the timing of the security into question.

5 Before this appeal was heard, the insurance policy underlying the PIC expired such that CAFO could no longer claim any unearned premiums and such that Stelco no longer had an interest in the litigation. Therefore, this court made a representation order requiring CAFO to pay the costs of the appeal on a substantial indemnity basis and appointing counsel to oppose CAFO's arguments.

Analysis

6 Section 4(1) of the PPSA provides:

This Act does not apply,

. . . . .

(c) to a transfer of an interest or claim in or under any policy of insurance or contract of annuity.

7 CAFO submits that the insured's right to obtain a refund of any unearned premiums coupled with the transfer of the insured's right to cancel the insurance policy operate so as to "transfer" an "interest" "in or under" any policy. As a result, the exemption created by s. 4(1) applies and exempts CAFO from the need to register its interest under the PPSA.

8 Farley J. rejected this submission. His most important reason for holding that CAFO's security interest does not fall within the exemption is that the right to a potential refund of unearned premium arises under the premium instalment financing agreement. He concluded at para. 17 of his judgment:

> It would seem to me that one would need stronger and more specific language to reasonably conclude that the context of s. 4(1)(c) of the PPSA was intended to encompass the return of unearned premiums since what one is looking at is the enforcement of rights under a financing agreement — and in theory, such a financing agreement could be used for any other item of commerce.

9 CAFO submits that the insurance premium financing agreement is not like other items of commerce. In most financings, security is taken in a property, most often a property that already exists. Here, CAFO's advance of funds creates the property: a fully paid-up insurance policy. Yet CAFO takes no interest in the underlying property. Nor does CAFO take any security against other assets owned by the insured. CAFO's only security is in the remaining unearned premiums on the policy. Items of commerce such as tangible wasting assets can be sold so that their value is "frozen" or preserved for all secured creditors. The insurance policy continues to run so that the value of the unearned premiums continues to decline and cannot be frozen by a quick sale.

10 In any event, s. 4(1)(c) deals specifically with transfers of interests or claims in insurance policies. It does not deal with "other items of commerce" and these are not exempted.

11 Insofar as the language of s. 4(1) is concerned, I am of the opinion that the wording does encompass the return of unearned premiums. The word "transfer" in s. 4(1)(c) includes an assignment. Black's Law Dictionary defines the word transfer as embracing:

> [E]very method — direct or indirect, absolute or commercial, voluntary or involuntary — of disposing of or parting with...an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption.
>
> . . . . .
>
> The four methods of transfer are by [e]ndorsement, by delivery, by assignment, and by operation of law.

12 The next question is whether assignments of unearned premiums create an "interest" in property. In the concluding line of para. 13, Farley J. observed, "one may reasonably question the proposition that 'the unearned premiums come into existence when the policy is funded, not when the policies are cancelled'."

13 It would be more accurate to say that a right to any unearned premiums is created when the policy is funded but the realization of that interest is contingent on the happening of a future event, namely, the non-payment of premiums and the cancellation of the policy. Nevertheless, the right is an "interest." For example, Black's Law Dictionary defines an interest as an aggregate of rights and further states that an interest "refers to any one right, privilege, power or immunity." Were it otherwise, even if CAFO was subject to the PPSA, CAFO would have nothing to register until a default occurred and by then it would likely be too late for CAFO to become a secured creditor.

14 With respect to whether the transfer of an interest is "in or under" the policy of insurance as opposed to the premium financing contract, Black's Law Dictionary indicates that the preposition "in" does not only mean "contained in". "In" also means "under or based upon the law of". The premium financing company's right to a refund is under the insurance

contract in the sense that the premium financing agreement identifies the insurance contract giving rise to the buyer's right to a refund: See Jacob Ziegel, in *Unearned Insurance Premiums as Security Interests under The Canadian Personal Property Security Acts*, 1 C.B.R. (5th) 173 at 179.

15 The wording of the exclusion in s. 4(1)(c) is clear and should be read as including the assignment of unearned premium under a policy of insurance.

16 My conclusion is also consistent with American jurisprudence. Farley J. considered six American cases that were cited to him: *Redfeather Fast Freight, Inc., Re*, 1 B.R. 446 (U.S. Bankr. D. Neb. 1979); *Matter of Maplewood Poultry Co., Re*, 2 B.R. 550 (U.S. Bankr. D. Me. 1980); *Auto-Train Corp., Re*, 9 B.R. 159 (U.S. Bankr. Dist. Col. 1981); *Air Vermont., Re*, 40 B.R. 335 (U.S. Bankr. D. Vt. 1984); *RBS Industries, Inc., Re*, 67 B.R. 946 (U.S. Bankr. D. Conn. 1986); and *U.S. Repeating Arms Co., Re*, 67 B.R. 990 (U.S. Bankr. D. Conn. 1986). He distinguished or rejected each of them, either because the particular state in question had specific PIC financing legislation or because the case contained little or no analysis and simply followed other cases. He also noted that the wording in Article 9-104 of the *Uniform Commercial Code (U.C.C.)* is slightly different than s. 4(1)(c) of the PPSA.

17 I agree with the application judge that Canadian courts should not simply follow American courts when interpreting similar legislative provisions. That said, I do not agree with him that the difference in wording between s. 4(1)(c) and the corresponding language in the American *U.C.C.'s* article 9-104(g) is significant. Article 9-104(g) provides:

> 9-104 This Article does not apply
>
> .....
>
> (g) to a transfer of an interest in a claim in or under any policy of insurance, except as provided with respect to proceeds (Section 9-306) and priorities in proceeds (Section 9-312).

The application judge observed that that the *U.C.C.* expressly excludes from the scope of s.9-104 an insurance claim as proceeds whereas s. 4(1)(c) does not. However, the difference in wording is not significant because the definition of "proceeds" in s. 1(1) of the PPSA accomplishes the same result: See Ziegel, *supra*, at p. 178 of his article on Unearned Premiums, *supra*.

18 There are two reasons why resort should be had to American jurisprudence in this case. The PPSA in Ontario and in other Canadian common law jurisdictions is closely patterned on Art. 9 of the *U.C.C.* and American jurisprudence should, therefore, provide helpful guidance. Secondly, the PPSA was enacted in the various common law jurisdictions to make the law uniform and to facilitate business in more than one jurisdiction: *Gimli Auto Ltd. v. Canada Campers Inc. (Trustee of)* (1998), 219 A.R. 166 (Alta. C.A.) at paras. 15-16.

19 The values of certainty, uniformity, and ease of commerce are promoted if s. 4(1) of the PPSA is construed so as to exempt CAFO from having to register its interest in any unearned premiums. Such an interpretation is consistent with the purpose and objective of the personal property security regimes enacted across the country and in the United States: *GMAC Commercial Credit Corp.-Canada v. TCT Logistics Inc.* (2004), 70 O.R. (3d) 321 (Ont. C.A.) at para. 20.

20 Further not all of the cases can be distinguished on this basis. Cases from states that do not have such legislation include *U.S. Repeating Arms Co., Re, supra*, *Big Squaw Mountain Corp., Re*, 122 B.R. 831 (U.S. Bankr. D. Me. 1990) at 9-10, *Matter of Maplewood Poultry Co., Re, supra*, at 4 and *Auto-Train Corp., Re, supra*, at 8. In those cases, the first step was to hold that the transaction was excluded from the operation of Art. 9 of the *U.C.C.* registration regime and then to look at the common law to determine the result.

21 In Ontario, interpreting s. 4(1) as exempting CAFO from registering its right to receive any unearned insurance premium leads one to s. 138 of the *Insurance Act*. It states:

> 138.(1) Where an insured assigns the right to refund of premium that may accrue by reason of the cancellation or termination of a contract of insurance under the terms thereof and notice of the assignment is given by the assignee

to the insurer, the insurer shall pay any such refund to the assignee despite any condition in the contract, whether prescribed under this Act or not, requiring the refund to be paid to the insured or to accompany any notice of cancellation or termination to the insured.

(2) Where the condition in the contract dealing with cancellation or termination by the insurer provides that the refund shall accompany the notice of cancellation or termination, the insurer shall include in the notice a statement that in lieu of payment of the refund in accordance with the condition the refund is being paid to the assignee under this section.

22 This is not to say that s. 138 gives CAFO the right to priority over other secured lenders. To determine priorities, resort to the common law or to the provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, would be necessary and that issue awaits another day. I do note, however, that in *Matter of Maplewood Poultry Co., supra*, the court held that a transfer of the insurance policies in question there could not be accomplished without placing the transferee on notice of the existence of a premium finance agreement because the policies contained explicit references to the premium finance agreements. Thus the exemption from registration under Art. 9 of the *U.C.C.* did no harm to public policy.

23 CAFO argues that no harm is done to public policy in any event because it is the proceeds of any insurance policy rather than the unearned premiums that form part of a lender's security. Clearly, however, the lender would have an interest in knowing if the insurance policy could be cancelled and unearned premiums remitted to the financier of a PIC. The exemption from the PPSA and its policy of providing notice to lenders about the state of the assets in which they will take security should not to be taken as a licence to keep lenders in the dark about the actual state of affairs. It behooves CAFO, and those who finance premium insurance contracts, to ensure that the policies contain explicit references to the insurance premium finance agreement itself and to the right of cancellation. In any event, when a judge decides whether to exercise his or her discretion to lift the stay under the CCAA and allow a premium financing company to obtain a refund of unearned premium, one consideration would be whether the policy clearly contained an explicit reference to the premium finance agreement.

24 Accordingly, I would allow the appeal and hold that CAFO has an interest in the unearned premiums that were transferred to it by virtue of the PICs and that that security interest was exempt from registration by virtue of a combination of s. 4(1)(c) of the PPSA and s. 138 of the *Insurance Act*.

25 By previous order of this court costs of this appeal are to the respondent on a substantial indemnity basis. I would fix those costs in the amount of $26,000, inclusive of GST and disbursements.

***Moldaver J.A.*:**

I agree.

***MacFarland J.A.*:**

I agree.

Appeal allowed.

TAB C

PricewaterhouseCoopers Inc. v Canada (Superintendent of Bankruptcy), 2008 ABCA 412

2008 ABCA 412
Alberta Court of Appeal

PricewaterhouseCoopers Inc. v. Canada (Superintendent of Bankruptcy)

2008 CarswellAlta 1962, 2008 ABCA 412, [2009] A.W.L.D. 140, 49 C.B.R. (5th) 33

In the Matter of the Bankruptcy of Fantasy Construction Ltd. Estate No. 109703 PricewaterhouseCoopers Inc. (Respondent / Applicant) and Office of the Superintendent of Bankruptcy (Applicant / Respondent) In the Matter of the Proposal of Southbend Construction Ltd. Estate No. 24-095683 Browning Crocker Inc. (Respondent / Applicant) and Office of the Superintendent of Bankruptcy (Applicant / Respondent)

J. Côté J.A.

Heard: December 3, 2008

Oral reasons: December 3, 2008 *
Docket: Edmonton Appeal 0803-0145-AC, 0803-0146-AC

Counsel: M.J. McCabe, Q.C. for Respondent / Applicant, PricewaterhouseCoopers Inc.
K.A. Rowan for Respondent / Applicant, Browning Crocker Inc.
K.N. Lambrecht, Q.C., G. Christidis for Appellant / Respondent, Office of the Superintendent of Bankruptcy

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — General principles Superintendent of Bankruptcy brought motion for leave to appeal — Motion granted in part on conditions — Conditional leave granted with respect to three questions of law — How should s. 128(3) of Bankruptcy and Insolvency Act be interpreted? In particular, do its last 11 words modify all, or only part, of preceding words of subsection? — Is Directive 10 of Superintendent of Bankruptcy ultra vires? — Is holder of builders' lien under Alberta, British Columbia, or Yukon legislation, against land not owned by insolvent person, automatically "secured creditor" of insolvent person within meaning of Act, if that person has made an accepted proposal or has been petitioned, or has assigned itself, into bankruptcy, irrespective of wording of any proposal? — If Superintendent was willing to abide by costs conditions, then he could take out formal order giving leave to appeal — If Superintendent thought that litigation would be too expensive, then he could abandon leave motion.

MOTION by Superintendent of Bankruptcy for leave to appeal.

J. Côté J.A.:

1 I am going to give leave to appeal on some conditions as to costs. I will draft those reasons setting conditions as to costs later and let you have a copy.

2 The Superintendent of Bankruptcy will have an option. If the Superintendent of Bankruptcy is willing to abide by the costs conditions, then he will be able to take out a formal order giving leave to appeal on certain grounds and with those conditions. But if the Superintendent of Bankruptcy thinks that the litigation is too expensive, then he can just abandon his leave motion, and there will be no leave to appeal. The Superintendent's election should be in writing.

3 I will now give you the three questions of law on which leave is granted conditionally.

(a) How should s. 128(3) of the *Bankruptcy and Insolvency* Act be interpreted? In particular, do its last 11 words modify all, or only part, of the preceding words of the subsection?

(b) Is Directive 10 of the Superintendent of Bankruptcy *ultra vires*, in part or whole?

(c) Is the holder of a builders' lien under Alberta, British Columbia, or Yukon legislation, against land not owned by the insolvent person, automatically a "secured creditor" of the insolvent person (within the meaning of the *Bankruptcy and Insolvency Act*), if that person has made an accepted proposal or has been petitioned, or has assigned itself, into bankruptcy, irrespective of the wording of any proposal?

4 Now I have before me motions for leave to appeal in two appeals. There was a third, but that has been resolved. Questions (a) and (b) apply to both appeals. Question (c) only applies to the Southbend Construction appeal.

5 I will also deal with costs of the motion today in the reasons which I file later giving terms and conditions respecting costs for granting leave.

Motion granted in part on conditions.

Footnotes

* Corrigendum issued by the court on December 11, 2008 has been incorporated herein.